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# Access to Justice: Impact of *Twombly* & *Iqbal* on State Court Systems

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## ACCESS TO JUSTICE: IMPACT OF *TWOMBLY* & *IQBAL* ON STATE COURT SYSTEMS

*Danielle Lusardo Schantz\**

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\* J.D. Candidate, The University of Akron School of Law, May 2019. I would like to thank my family for giving me the time and support necessary to be part of the *Akron Law Review*. Deep appreciation to my husband who took on more than his fair share of the household responsibilities so that I could hide in the library and write. Lastly, I thank Professor Bernadette Bollas Genetin for sharing her genuine enthusiasm for all things Civil Procedure.

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## I. INTRODUCTION

There are common held beliefs that serve as cornerstones of the American justice system. These principles include the right to counsel, the presumption of innocence, the protection from double jeopardy, and the prohibition of self-incrimination. Another fundamental belief is that everyone should have *access to justice* regardless of how or where they pursue a lawsuit. The right to access justice has been operationalized by the procedural rules regarding pleading a complaint. Until approximately ten years ago, the long-held standard of notice pleading guaranteed that everyone could have his or her day in court. However, with the *Twombly*<sup>1</sup> and *Iqbal*<sup>2</sup> (together commonly referred to as *Twigbal*) decisions, the Supreme Court of the United States changed the pleading requirements for federal suits from notice to plausibility pleading. And while practitioners and academics disagree about the impact of this change, there is no doubt about the confusion it has created in the state courts. Civil procedure, which can be complicated for practitioners let alone pro se litigants, “will become even more byzantine, unpredictable, and local” due to this change.<sup>3</sup> This Article considers the impact of plausibility pleading on the fundamental right of access to the courts, using the Ohio state court system as a case study.

Section II briefly outlines the fundamental nature of the American right to access justice through the court system. Section III summarizes the objectives of the Federal Rules of Civil Procedure (FRCP), the way in

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1. Bell Atlantic Corp. v. Twombly (*Twombly*), 550 U.S. 544 (2007).

2. Ashcroft v. Iqbal (*Iqbal*), 556 U.S. 662 (2009).

3. Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 123 (2010).

which the Rules are amended, and the development of replica jurisdictions among the state courts. Next, Section IV revisits the long-held notice pleading standard as explained in *Conley v. Gibson*<sup>4</sup> and the eventual move towards plausibility pleading made in *Bell Atlantic Corp. v. Twombly*<sup>5</sup> and *Ashcroft v. Iqbal*.<sup>6</sup> The federal shift to plausibility pleading has started to trickle down into various state court systems. Section V summarizes the current status of the replica (and related) jurisdictions on this issue and compares the way three states—Colorado, Minnesota, and Tennessee—have dealt with the issue. The development of the Ohio Rules of Civil Procedure (ORCP), the Ohio Rules’ intentional focus on just results, the ways in which the Ohio Rules are amended, and the muddled situation developing in the Ohio district courts is covered in Section VI. Finally, Section VII enumerates the reasons why Ohio should remain committed to a liberal notice pleading standard in order to ensure access to justice via the courts.

## II. ACCESS TO JUSTICE VIA THE COURTS

### A. *Access to Justice is a Constitutional Right*

One of the most basic and fundamental of our rights is the access to justice. For the founding fathers there was no right more essential, seen by “access to justice provisions appear[ing] in many of the original Thirteen Colonies” founding documents.<sup>7</sup> However, when the Constitution was written, this assumed right was not explicitly included. One of the purposes of the Ninth Amendment was to address this issue—to include those undeniably guaranteed rights that had not been enumerated.<sup>8</sup> Justice Scalia, at the 40th anniversary celebration of the Legal Services Corporation<sup>9</sup> pointed out, “the pledge of allegiance itself says ‘Liberty and justice for all’ . . . Can there be a just society when some do not have justice?”<sup>10</sup> If access to justice is indeed this foundational of a right, then how is it guaranteed to the citizens of this country? Every right

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4. *Conley v. Gibson*, 355 U.S. 41 (1957).

5. *Twombly*, 550 U.S. 544.

6. *Iqbal*, 566 U.S. 662.

7. Leonard W. Schroeter, *The Jurisprudence of Access to Justice: From Magna Carta to Romer v. Evans via Marbury v. Madison* (1996), <http://www.seanet.com/~rod/marbury.html> [https://perma.cc/UT66-BRR9].

8. *Id.*

9. About LSC, LEGAL SERVICES CORP., <https://www.lsc.gov/about-lsc> [https://perma.cc/DB44-HBNA] (last visited Mar. 20, 2018).

10. SUPREME COURT OF OHIO, TASK FORCE ON ACCESS TO JUSTICE, OHIO SUPREME COURT ACCESS TO JUSTICE REPORT & RECOMMENDATIONS at 2 (2015).

“requires a capability of securing a remedy . . . Thus, rights cannot exist and have meaning if the system cannot be accessed. . . .”<sup>11</sup>

*B. Access to the Courts Procedurally Guarantees the Constitutional Right to Justice*

Historically, the constitutional right to justice has been achieved via the procedural right to access the court system. In modern times, courts have held that the right to access the courts is basic to our system of governance and protected by the Constitution.<sup>12</sup> This right must be “adequate, effective and meaningful and . . . [the] interference with right of access to the courts gives rise to claims for relief under the civil rights statutes.”<sup>13</sup> The very stability of American society depends on the ability of the people to access the court system in order to resolve disputes in a non-violent and civilized manner.<sup>14</sup>

Several states, including Ohio, have commissioned task forces to identify gaps in and obstacles to accessing the civil court system. In 2015, Chief Justice Maureen O’Connor appointed the Task Force on Access to Justice (Taskforce) to do just this for the state of Ohio.<sup>15</sup> Chief Justice O’Connor identified access to justice as a priority in Ohio and stated: “It is imperative that the bench and the bar work together in these difficult financial times to maintain access to justice.”<sup>16</sup>

The Task Force was chaired by former Ohio Supreme Court Justice Yvette McGee Brown and included ten other judges, attorneys, and legal advocates.<sup>17</sup> The group met five times during the course of its deliberations, methodically addressing the directive issued by Chief Justice O’Connor.<sup>18</sup> After studying the situation in Ohio and the efforts made in other states, the Task Force made eleven specific recommendations,<sup>19</sup> two of which are of particular relevance to this

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11. Schroeter, *supra* note 7.

12. *Id.*

13. *Id.*

14. Robert J. Grey, Jr., *Access to the Courts: Equal Justice for All*, INT’L INFO. PROGRAM ELEC. J. (Aug. 2004), <https://usa.usembassy.de/etexts/gov/ijde0804.pdf> [<https://perma.cc/ACR7-REJ2>]

15. SUPREME COURT OF OHIO, *supra* note 10, at 2.

16. Chief Justice Maureen O’Connor, Speech at Opening Courtroom Doors: Access to Justice in Ohio (Feb. 22, 2013), available at The Supreme Court of Ohio, <http://www.supremecourt.ohio.gov/PIO/Speeches/2013/accessJustice.asp> [<https://perma.cc/Z7DP-6265>].

17. SUPREME COURT OF OHIO, *supra* note 10, at 3.

18. *Id.* at 4.

19. *Id.* at 14-35. Taskforce recommendations include: (1) General Revenue Appropriation for Civil Legal Aid in Ohio, (2) Pro Hac Vice Funding for Legal Services, (3) Implement an Add-On Fee

Article. The Task Force called for the Supreme Court to create an Access to Justice Director position.<sup>20</sup> The Director would be responsible for assessing, coordinating, and directing statewide access to justice efforts, which would help ensure a sustained commitment to the effort.<sup>21</sup> The creation of a full-time position responsible for maintaining the state's focus on access to justice is evidence of just how important and fundamental a right this is, especially in Ohio. The Task Force also called for the development of an Access to Justice Impact Statement that would be researched and written by the Director and filed any time an amendment to the Ohio Rules of Court is proposed.<sup>22</sup> Much like the fiscal impact statements that are required for every proposed bill to the Ohio General Assembly, this statement would address:

- the likely number of Ohioans impacted by the proposed change;
- whether the change will increase or decrease access to Ohio's courts for low-income Ohioans;
- what impact the proposed change will have on Ohio's minority populations' access to the courts;
- and, what impact, if any, the proposed change will have on the ability of Ohioans with limited English proficiency to access justice.<sup>23</sup>

In addition to the provisions for the rule-making process in Ohio, the Access to Justice Impact Statement would allow the Director to request information and consult with governmental bodies and related legal organizations that serve these populations.<sup>24</sup> This way the Court will have the most complete information possible as to the effect of a proposed rule change prior to consideration.<sup>25</sup> As the creation of this Taskforce and the resulting report demonstrate, access to the courts is a priority in Ohio, which makes it especially important for Ohio to clarify its commitment to notice pleading as discussed later in this Article.

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for Attorney Registration, (4) Create a Supreme Court Access to Justice Director Position, (5) Development of an Access to Justice Impact Statement, (6) Technology, (7) Self-Help Centers, (8) Limited-Scope Representation, (9) Revising Ohio's License Requirements in Support of Military Spouse Attorneys, (10) Emeritus Rule, and (11) Forms.

20. *Id.* at 22.

21. *Id.*

22. *Id.* at 24-25.

23. *Id.* at 25.

24. *Id.*

25. *Id.*

### III. THE FEDERAL RULES OF CIVIL PROCEDURE

#### A. *Development and Objectives of the FRCP*

The Rules Enabling Act was signed on June 19, 1934 and gave the Supreme Court of the United States the opportunity and authority to develop a comprehensive set of procedural court rules for federal civil actions.<sup>26</sup> This legislation marked the beginning of an effort to create an organized approach to federal judicial administration and also intended to provide a model for the state civil court systems, many of which had difficulties with the excessive technicalities of code pleading.<sup>27</sup> When considering the role of the complaint in the development of the FRCP, the Court recognized the need for a uniform pleading standard given the inconsistent ways the state jurisdictions had historically approached the topic.<sup>28</sup> This uniformity is especially important because the federal court's approach to pleadings was determined by the state in which that federal court was sitting.<sup>29</sup> Over the next couple of decades, more than half of the states adopted the FRCP and many others were heavily influenced by these new procedures.<sup>30</sup>

The FRCP intentionally moved away from code pleading towards notice pleading. This new liberal approach to pleading only required that the plaintiff provide a "short and plain statement" of the claim.<sup>31</sup> The identification of evidence and the factual development of the case moved to the discovery process.<sup>32</sup> This new approach to pleading increased litigant access to the judicial process and ultimately justice. This shift to a liberal pleading standard illustrated the FRCP's emphasis on equity rather than technical expertise in the administration of justice. Notice pleading was later adopted by many of the states and has become a part of our cultural understanding of the courts.<sup>33</sup>

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26. Charles E. Clark & James W. Moore, *A New Federal Civil Procedure – I. The Background*, 44 YALE L.J. 387, 387 (1935); see 28 U.S.C.S. §§ 2071-2077 (LEXIS through Pub. L. No. 115-164).

27. John P. Sullivan, *Do the New Pleading Standards Set Out in Twombly and Iqbal Meet the Needs of the Replica Jurisdictions?*, 47 SUFFOLK U. L. REV. 53, 57 (2010). Code pleading was the process of alleging a very specific set of facts. It served to create a significant hurdle for plaintiffs to have to overcome in order to proceed with a claim. Alana Jochum, Note, *Pleading in Ohio After Bell Atlantic v. Twombly and Ashcroft v. Iqbal: Why Ohio Shouldn't "Notice" a Change*, 58 CLEV. ST. L. REV. 495, 498 (2010).

28. Charles E. Clark & James W. Moore, *A New Federal Civil Procedure – II. Pleadings and Parties*, 44 YALE L.J. 1291, 1299 (1935).

29. *Id.*

30. Sullivan, *supra* note 27, at 57.

31. See FED. R. CIV. P. 8(a)(1).

32. Sullivan, *supra* note 27, at 57.

33. See *infra* Section VI.A.

### B. *Amending the FRCP*

Congress created the Judicial Conference in 1922 with the objective of producing guidelines for the administration of courts in the United States.<sup>34</sup> The Rules of Practice and Procedure subcommittee of the Judicial Conference is responsible for drafting proposed amendments to the FRCP, which is made up of federal judges, lawyers, state justices, and representatives from the Department of Justice.<sup>35</sup> The process—which includes committee drafting, periods for public comments, hearings, and an associated report—is structured to allow for ample consideration and public feedback of the amendments and possible implications for the court system.<sup>36</sup> Once the proposed amendments are finalized they are forwarded to the Supreme Court who must approve and forward to Congress.<sup>37</sup> If Congress does not take action to reject or modify the proposed amendments, they take effect.<sup>38</sup>

Needless to say, this process is thorough and deliberate, and amendments to the FRCP do not happen based on isolated concerns or specific cases. The process allows change over time without sudden shifts, which create confusion and conflict as we have seen with the Supreme Court's rulings in *Twombly*<sup>39</sup> and *Iqbal*.<sup>40</sup> If the Supreme Court had significant concerns about notice pleading as outlined in the FRCP, the appropriate response would have been to utilize the established procedures outlined above and “not to raise the pleading standard through a judicial opinion.”<sup>41</sup> The Judicial Conference is designed for this exact purpose by gathering a wide range of feedback and perspectives concerning topics of such importance as changing citizen access to the courts.<sup>42</sup>

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34. Federal Court Rules Research Guide, GEORGETOWN LAW LIBRARY (May 31, 2016, 11:31 AM), <http://guides.ll.georgetown.edu/c.php?g=320799&p=2146449> [<https://perma.cc/6FLA-YDE8>].

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

40. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

41. William Funk et al., *Plausibility Pleading: Barring the Courthouse Door to Deserving Claimants*, CTR. FOR PROGRESSIVE REFORM, 14 (May 2010), [http://www.progressivereform.org/articles/Twombly\\_1005.pdf](http://www.progressivereform.org/articles/Twombly_1005.pdf) [<https://perma.cc/7N8N-JPJB>].

42. *Id.*



### C. *Replica Jurisdictions*

Replica jurisdictions are state court systems that chose to adopt the FRCP for their respective state systems, and then rely on federal court interpretation of the FRCP as instructive to their own interpretation of state rules of civil procedure.<sup>43</sup> After the adoption of the FRCP, it was hoped that the state court systems would follow suit.<sup>44</sup> Initially, this seemed to be the case with the creation of 23 replica jurisdictions by 1975 and many others that closely patterned their civil rules after the FRCP.<sup>45</sup> This uniformity in civil rules across the state court systems was intended to make it easier for litigants to pursue cases either locally or federally as well as focus attention on the merits of the case rather than the procedural variation that existed across jurisdictions.<sup>46</sup> However, this effort was stalled in the 1980's for several reasons:<sup>47</sup> (i) federal judges started to rely more on local rules;<sup>48</sup> (ii) interest groups began to lobby rulemakers trying to create procedural advantages for their particular perspectives;<sup>49</sup> (iii) state court systems began to assert their inherent rulemaking power as a demonstration of a resurgence of state government authority;<sup>50</sup> and (iv) the *Twigbal* decisions further challenged the importance of procedural uniformity by changing the direction of the FRCP and effectively making it much more difficult for true replica jurisdictions to exist without similar changes in all of those jurisdictions.<sup>51</sup>

Before the *Twigbal* cases, there were 23 “replica” jurisdictions.<sup>52</sup> Another four jurisdictions had similar rules but they were established in statutory codes.<sup>53</sup> And lastly, three additional jurisdictions were very similar to the FRCP without being identical.<sup>54</sup> In total, there were 29 state

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43. A. Benjamin Spencer, *Pleading in State Courts After Twombly and Iqbal*, POUND CIVIL JUSTICE INST. 2010 FORUM FOR STATE APPELLATE COURT JUDGES (July 1, 2010), <https://ssrn.com/abstract=2038349> [<https://perma.cc/3FGF-3Z8P>].

44. Michalski, *supra* note 3, at 112.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 113-14.

51. *Id.*

52. Replica jurisdictions include: Alabama, Alaska, Arizona, Colorado, District of Columbia, Hawaii, Indiana, Kentucky, Maine, Massachusetts, Minnesota, Montana, New Mexico, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377 (1986).

53. These jurisdictions include: Georgia, Kansas, Oklahoma, and North Carolina. See *id.* at 1378.

54. These jurisdictions include: Idaho, Mississippi, and Nevada. See *id.* at 1377.

jurisdictions in addition to the District of Columbia that had rules mirroring the language of FRCP 8, which became subject to reinterpretation due to the *Twiqbal* decisions.<sup>55</sup> In other words, rather than following the rule amendment process outlined above, which would have provided ample time and opportunity for the legal community to consider the impact of a change in pleading requirements, the Supreme Court changed the interpretation of the FRCP with these two isolated cases. This reinterpretation then created a dilemma for the replica jurisdictions. Should they follow the federal move toward plausibility pleading or remain committed to notice pleading? It is important to note that Supreme Court decisions, while persuasive, are not binding in the state court system. However, the courts in these jurisdictions have historically looked to Supreme Court decisions to inform the application of their own rules given their similarity in structure and substance. This adds to the complexity of the situation and the confusion *Twiqbal* has created.

#### IV. NOTICE PLEADING AND THE ROAD TO PLAUSIBILITY

##### A. *Notice Pleading*: *Conley v. Gibson*

After the FRCP were enacted in 1938, the Supreme Court clearly outlined the requirements for notice pleading in *Conley v. Gibson*.<sup>56</sup> In *Conley*, a group of African-American employees of the Texas and New Orleans Railroad filed a class action suit against Local Union No. 28 under the Railway Labor Act for failing to advocate for them when the railroad claimed to eliminate their jobs only to later fill them with white employees.<sup>57</sup> The suit was pursued in federal court. The union moved and the court dismissed the case for failure to state a claim upon which relief could be granted as outlined in FRCP 8(a).<sup>58</sup> Even though the district court did not provide much reasoning for the dismissal, the Court of Appeals for the Fifth District affirmed the decision and the Supreme Court granted certiorari.<sup>59</sup>

In reversing the decision, the Supreme Court outlined the requirements for a claim to survive a 12(b)(6) Motion for Judgment on the Pleadings.<sup>60</sup> Unlike the old code pleading system, a complaint did not

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55. Spencer, *supra* note 43, at 14.

56. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

57. *Id.* at 43.

58. *Id.*

59. *Id.* at 44.

60. *Id.* at 45-46.

need to set out detailed factual allegations.<sup>61</sup> The complaint must only make “a short and plain statement of the claim.”<sup>62</sup> As long as the claim provided enough information to give notice to the defendant about the grounds upon which it rests, the claim would be sufficient.<sup>63</sup> The court then went on to indicate that this liberal pleading standard was based on the idea that pleading should not be based on technical skills but rather allow claims to progress and be judged based on their merits.<sup>64</sup> A claim should not be dismissed unless “it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>65</sup> Other devices, such as discovery, should be used to flesh out factual details of the suit.<sup>66</sup> This decision solidified the intent of FRCP, which was to insure that every claimant could access justice via the courts as long as the complaint met these minimum standards. Similarly, many state courts, especially replica jurisdictions, cite to *Conley* to inform their pleading standards.<sup>67</sup>

#### B. *The Birth of Plausibility Pleading: Bell Atlantic Corp. v. Twombly*

Notice pleading became the assumed standard for the American legal system, so much so that the legal community was not expecting the dramatic shift that would occur some 50 years later in *Bell Atlantic Corp. v. Twombly*.<sup>68</sup> In fact, Justice Stevens remarked in his dissent of *Twombly*, “today’s opinion is the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation.”<sup>69</sup> In *Twombly*, the plaintiffs represented a class of subscribers of local telephone and internet service who claimed violation of the Sherman Act by the Incumbent Local

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61. *Id.* at 47.

62. FED. R. CIV. P. 8(a)(2).

63. *Id.*

64. *Gibson*, 355 U.S. at 48 (1957).

65. *Id.* at 45-46.

66. *Id.* at 47-48.

67. See *Wackerli v. Martindale*, 353 P.2d 782 (Idaho 1960); *Mills v. Orcas Power & Light Co.*, 355 P.2d 781 (Wash. 1960); *Long v. Ariz. Portland Cement Co.*, 362 P.2d 741 (Ariz. 1961); *Midkiff v. Castle & Cooke, Inc.*, 368 P.2d 887 (Haw. 1962); *Sprott v. Roberts*, 390 P.2d 465 (Colo. 1964); *Spaberg v. Johnson*, 392 P.2d 78 (Mont. 1964); *Hambaugh v. Peoples*, 401 P.2d 777 (N.M. 1965); *Voisin v. Luke*, 191 So. 2d 503 (La. 1966); *Bragg v. Warwick Shoppers*, 227 A.2d 582 (R.I. 1967); *Shannon v. Anchorage*, 429 P.2d 17 (Alaska 1967); *Richards v. Ellis*, 233 A.2d 37 (Me. 1967); *Residential Dev., Inc. v. Mann*, 169 S.E.2d 305 (Ga. 1969); *Pride v. Peterson*, 173 N.W.2d 549 (Iowa 1970); *Sutton v. Duke*, 176 S.E.2d 161 (N.C. 1970); *Forks v. Warsaw*, 273 N.E.2d 856 (Ind. 1971); *People ex rel. Willis v. Dep’t of Corr.*, 282 N.E.2d 716 (Ill. 1972); *Brown v. Vanity Fair Mills, Inc.*, 277 So. 2d 893 (Ala. 1973); *Baker v. Rangos*, 324 A.2d 498 (Pa. 1974); *Iacono v. Anderson Concrete Corp.*, 326 N.E.2d 267 (Ohio 1975).

68. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (emphasis in original).

69. *Id.* at 578.

Exchange Carriers (ILECs).<sup>70</sup> The Sherman Act prohibited any kind of contract or agreement in restraint of trade or commerce between the states.<sup>71</sup> The plaintiffs accused the ILECs that were created by the break-up of the American Telephone & Telegraph Company's (AT&T) local telephone business, of such collusion.<sup>72</sup> The ILECs were supposed to share their networks with other local exchange carriers to promote competition in the market.<sup>73</sup> Instead, the plaintiffs asserted that the ILECs agreed not to enter each other's territory as demonstrated by their parallel conduct, which in turn prohibited the growth of new upstart companies.<sup>74</sup>

The defendants asserted that the parallel conduct was not coordinated, but rather coincidental.<sup>75</sup> The district court agreed and granted the motion concluding that the plaintiffs must "allege additional facts tending to exclude independent self-interested conduct as an explanation for the parallel actions."<sup>76</sup> When appealed, the Second Circuit reversed the decision and found that the liberal notice pleading standard of FRCP 8 had been met and that the district court had used the wrong standard.<sup>77</sup> It held that "plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal."<sup>78</sup> The Supreme Court then granted certiorari to address the proper standard needed when pleading parallel conduct in an antitrust case.<sup>79</sup>

The Court went on to recite the notice pleading standard in *Conley*, but then added additional requirements, in effect changing the pleading standard required to survive dismissal. The Court stated that "the pleading must contain something more" than a set of facts that suggested there had been coordinated, deceptive action on the part of the ILECs.<sup>80</sup> An allegation of parallel conduct as evidence of an antitrust violation "gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility. . . ."<sup>81</sup> Thus the plausibility pleading standard was born.

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70. *Id.* at 544.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 553.

78. *Id.* (emphasis in original).

79. *Id.*

80. *Id.* at 555 (quoting Wright & A. Miller, Federal Practice and Procedure sec. 1216 (3d ed. 2004)).

81. *Id.* at 557.

As outlined in detail in Justice Stevens' dissent, the Court acted in direct contradiction to the liberal pleading standard of the FRCP, which wished to keep litigants in the court so that the merits of a claim could be assessed during other pretrial processes or trial itself if appropriate.<sup>82</sup> Justice Stevens went on to quote Charles E. Clark, the principal author of the FRCP, who explained that the purpose of a liberal pleading standard was to simply "[distinguish] the case from all others, so that the manner and form of trial and remedy expected are clear" not to demonstrate proof of the case.<sup>83</sup> Justice Stevens then returned to the language of *Conley* and reminded the Court that a complaint should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>84</sup> Matters of evidence were to be left to other phases of the trial process under the FRCP. He went even further to suggest that the majority had mistakenly used the heightened *summary judgment* burden rather than the appropriate *pleading* burden required for allegations of an illegal conspiracy, as outlined in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>85</sup> In summation, Justice Stevens pointed out: "[T]hree important sources of law—the Sherman Act, the Telecommunications Act of 1996, and the Federal Rules of Civil Procedure—all point unmistakably in the same direction, yet the Court marche[d] resolutely the other way."<sup>86</sup>

### C. *The Growth of Plausibility Pleading: Ashcroft v. Iqbal*

Commentators, surprised by and critical of the Court's new "plausibility" pleading standard as outlined in *Twombly*<sup>87</sup> hoped that the new standard would only apply to antitrust cases. Two years later in *Ashcroft v. Iqbal*, which involved a Bivens action, the Court indicated otherwise.<sup>88</sup> Iqbal, the plaintiff who was Pakistani and Muslim, was arrested just after the September 11, 2001 terrorist attacks.<sup>89</sup> After arrest, Iqbal claimed he was subjected to harsh conditions, by being confined due

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82. *Id.* at 575 (Stevens, J., dissenting).

83. *Id.* (quoting Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A.J. 976, 977 (1937)).

84. *Twombly*, 550 U.S. at 577 (Stevens, J., dissenting) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

85. *Id.* at 585-86 (citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

86. *Id.* at 596.

87. *Twombly*, 550 U.S. at 570.

88. *Ashcroft v. Iqbal*, 566 U.S. 662 (2009).

89. *Id.* at 666.

to his religion and ethnic identification.<sup>90</sup> The plaintiff asserted these claims against numerous people including John Ashcroft, former Attorney General, and Robert Mueller, Director of the FBI, and asserted that these two individuals knew of and adopted this unconstitutional policy.<sup>91</sup> The defendants moved to dismiss the suit claiming the complaint was not sufficient and based on mere speculation.<sup>92</sup> The district court denied the motion to dismiss and the defendants filed an interlocutory appeal, but the Court of Appeals for the Second Circuit affirmed the district court's denial of the motion and found that *Iqbal*'s complaint was adequate to proceed.<sup>93</sup>

Upon review, the Supreme Court cited the *Twombly* decision establishing plausibility pleading and reversed the appellate court's decision finding that *Iqbal*'s claim was not sufficient.<sup>94</sup> The Court then outlined a new two-pronged approach to reviewing complaints.<sup>95</sup> First, although the Court must accept as true all factual allegations made in a complaint, this presumption did not apply to mere legal conclusions that were asserted in a complaint.<sup>96</sup> Secondly, only complaints that stated a plausible claim survived a motion to dismiss.<sup>97</sup> The Court held that *Iqbal*'s complaint did not meet this plausibility standard and reversed the lower court's decision.<sup>98</sup>

*Iqbal* confirmed that plausibility pleading was here to stay, but the Court was divided.<sup>99</sup> Justice Souter, who wrote the *Twombly* majority opinion, joined by Justice Stevens, Justice Ginsburg, and Justice Breyer dissented not only to the pleading standard used but also to the conclusion that *Iqbal*'s complaint would not meet the heightened plausibility pleading standard.<sup>100</sup> "*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true . . . [A] court must take the allegations as true, no matter how skeptical the court may be."<sup>101</sup> Justice Souter further explained that the only exceptions to this presumption were those that were "sufficiently fantastic to defy reality" like claims of "little green men."<sup>102</sup> Justice Breyer, in his own

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 666.

94. *Id.* at 680.

95. *Id.* at 678.

96. *Id.*

97. *Id.* at 679.

98. *Id.* at 687.

99. *Id.*

100. *Id.* at 696-97 (Souter, J., dissenting).

101. *Id.* at 696.

102. *Id.*

dissent, challenged the idea that a change in pleading standard was necessary due to the impact of unwarranted litigation on the efficient operation of the courts.<sup>103</sup> Just as the Second Circuit explained, Justice Breyer believed there were plenty of other ways for the courts to deal with this issue rather than taking such a drastic measure as changing the pleading standard.<sup>104</sup> There was no evidence to believe that these other case management tools were not adequate.<sup>105</sup>

In the ten years since the *Twigbal* cases there have been countless court opinions, journal articles, blog posts, and academic debates regarding the impact of these decisions. Most federal courts have followed suit and transitioned to the plausibility standard even though the FRCP have not been amended.<sup>106</sup>

This reinterpretation of the federal pleading standard has created a dilemma for the replica state jurisdictions that historically have utilized Supreme Court decisions to interpret their own rules. Should the state courts follow suit and significantly change the pleading standards in their own local systems based on two Supreme Court cases, essentially ignoring the rulemaking and amending procedures outlined in their jurisdictions? How would this fundamental change affect the public's access to justice in the state court systems, which handles significantly more civil suits as compared with the federal court system? A change to the pleading standard in the state courts carries with it even greater implications for the access to justice, if for no other reason than the number of litigants involved.

## V. PLAUSIBILITY PLEADING AND STATE COURT SYSTEMS

### A. *The Current "State" of Affairs, Ten Years After Twigbal*

In the ten years that have passed since the *Twigbal* decisions, plausibility pleading has begun to creep into the state court systems. As already mentioned, the *Twigbal* decisions invited re-interpretation of the notice pleading standard that had been embraced by replica jurisdictions. Of those 30 jurisdictions, 12 state supreme courts have considered the

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103. *Id.* at 699-700 (Breyer, J., dissenting).

104. *Id.* at 700.

105. *Id.*

106. Darcy Jalandoni & David Shouvin, *Ohio and Twombly/Iqbal: Plausible?*, OHIO LAWYER (May/June 2015), <https://www.porterwright.com/files/upload/OhioLawyer-Jalandoni-Shouvin-May-June2015.pdf>.<http://www.porterwright.com/files/upload/OhioLawyer-Jalandoni-Shouvin-May-June2015.pdf#.s.5> [<https://perma.cc/G6UM-PFAN>].

issue.<sup>107</sup> Five have chosen to follow the federal court system and adopt plausibility pleading,<sup>108</sup> while seven have remained committed to notice pleading.<sup>109</sup> The remaining 18 jurisdictions have not yet considered the issue and continue to utilize notice pleading by default.<sup>110</sup> One could assert that although the Supreme Court circumvented the rule amendment process, the change from notice pleading to plausibility pleading is so significant that all former replica jurisdictions lost that status until they decide to follow suit. And some have done just that.

As in the United States Supreme Court, the state jurisdictions that have considered plausibility pleading have done so through judicial interpretation, rather than through their established rulemaking processes. The supreme courts of Colorado, Minnesota, and Tennessee are illustrative examples to consider. The Colorado Supreme Court has moved to plausibility pleading, in line with the decisions in *Twombly* and *Iqbal* in an effort to maintain procedural uniformity with the federal system.<sup>111</sup> The Minnesota<sup>112</sup> and Tennessee<sup>113</sup> state supreme courts decided, on the contrary, to maintain notice pleading.

#### B. *Colorado Plausibility Pleading*

On June 27, 2016, the Colorado Supreme Court ruled on the notice/plausibility pleading issue in *Warne v. Hall*, when presented with the opportunity to confirm the state's pleading standard in light of the *Twiqbal* decisions.<sup>114</sup> In a split 4-3 decision, the Court adopted plausibility pleading in order to maintain uniformity with the FRCP.<sup>115</sup> As a replica jurisdiction, Justice Coats explained, the Court had benefitted from having procedural uniformity with the federal system.<sup>116</sup> The Court cited their reliance on the federal courts to help interpret the Colorado pleading

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107. See Appendix *infra*: Replica Jurisdictions—Arizona, Colorado, District of Columbia, Maine, Massachusetts, Minnesota, Montana, New Mexico, Rhode Island, South Dakota, Tennessee, and Washington.

108. See Appendix *infra*: Replica Jurisdictions—Colorado, District of Columbia, Maine, Massachusetts, and South Dakota.

109. See Appendix *infra*: Replica Jurisdictions—Arizona, Minnesota, Montana, New Mexico, Rhode Island, Tennessee, and Washington.

110. See Appendix *infra*: Replica Jurisdictions—Alabama, Alaska, Hawaii, Indiana, Kentucky, North Dakota, Ohio, Utah, Vermont, West Virginia, Wyoming, Georgia, Kansas, North Carolina, Oklahoma, Idaho, Mississippi, and Nevada.

111. *Warne v. Hall*, 373 P.3d 588, 590 (Colo. 2016).

112. *Walsh v. U.S. Bank*, 851 N.W.2d 598 (Minn. 2014).

113. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422 (Tenn. 2011).

114. *Warne*, 373 P.3d at 588.

115. *Id.* at 590.

116. *Id.* at 592.



standard as a primary reason to maintain procedural uniformity.<sup>117</sup> And while the Court admitted that federal decisions are not binding and that the Court has occasionally deviated from the FRCP, a slim majority concluded that disagreeing with the Supreme Court on the interpretation of “short and plain statement” would “risk undermining confidence in the judicial process and the objective interpretation of codified law.”<sup>118</sup>

Additionally, just as in the *Twigbal* cases, the Colorado Supreme Court relied on a desire to mitigate the costs of modern litigation and expensive discovery processes as a reason to adopt plausibility pleading.<sup>119</sup> In fact, Justice Coats asserted that the impact of plausibility pleading might prove to be even more important in Colorado than in the federal court system.<sup>120</sup> Lastly, Justice Coats indicated that there is value in maintaining a uniformity of procedure so that attorneys would feel just as comfortable practicing in Colorado as they would in the federal system.<sup>121</sup>

Justice Gabriel, writing for the three-judge dissent, responded persuasively to these arguments. He pointed out that the majority threw out a rule that had been utilized by the Court for over 50 years with no major concerns or problems.<sup>122</sup> In fact, he believed that this change to plausibility pleading misinterpreted Colorado Rule of Civil Procedure 8 and added a new requirement that did not exist in the rule as written in order to maintain uniformity with the FRCP, which are not binding in state courts.<sup>123</sup> Even worse, the dissent argued, other courts have found that plausibility pleading “results in a loss of clarity, stability, and predictability.”<sup>124</sup>

In response to the majority’s argument that the state needs to expedite litigation and avoid the rising costs of discovery, Justice Gabriel reminded the majority that the Court recently implemented new case management tools and changes to the rules regarding discovery just a year earlier.<sup>125</sup> There was no reason to believe that these changes would not adequately address these concerns and necessitate such a drastic departure from the Court’s historical commitment to notice pleading.<sup>126</sup>

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117. *Id.*

118. *Id.*

119. *Id.* at 594.

120. *Id.*

121. *Id.* at 593.

122. *Id.* at 597 (Gabriel, J., dissenting).

123. *Id.*

124. *Id.*

125. *Id.* at 601.

126. *Id.*

The dissenting opinion went on to list several of the most common criticisms of plausibility pleading. For example, there are practical limitations to how much information a plaintiff can provide in the pleading stage before any discovery has occurred.<sup>127</sup> This is especially evident in cases of discrimination where a plaintiff would not have access to much of the evidence because it resides with the defendant.<sup>128</sup> Also, in response to concerns about baseless claims, Justice Gabriel reminded the majority that all pleadings are subject to the requirements of Colorado Rule of Civil Procedure 11, which mandates the signature of an attorney of record as certification that the pleading is warranted by existing law and is made in good faith.<sup>129</sup> He concluded by indicating that there is no evidence that notice pleading had contributed to a flood of frivolous claims that cannot be weeded out by the checks and balances implicit in the current civil rules.<sup>130</sup>

Most significantly, Justice Gabriel warned that a change to plausibility pleading would “deny access to justice for innumerable plaintiffs with legitimate complaints.”<sup>131</sup> Nearly half of the Court believed that there was no compelling reason to change the pleading standard for Colorado.<sup>132</sup>

In reviewing the state court decisions that have adopted plausibility pleading the Colorado Supreme Court is the only one that outlines specific arguments for the adoption of this new standard.<sup>133</sup> In fact, all of the other jurisdictions simply adopt the plausibility standard because they agree with the Supreme Court’s new interpretation of Rule 8.<sup>134</sup> This is disconcerting given the drastic impact a change in pleading standard will have on future litigants and the public’s access to the courts as Justice Gabriel outlined in his dissenting opinion.

Because this change is so consequential, I offer several other important counter arguments in addition to those outlined in Justice Gabriel’s dissenting opinion. For example, Justice Coats indicates that adopting the plausibility pleading standard is important so that Colorado courts can rely on federal case law to aid in interpretation of the local

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127. *Id.* at 598.

128. *Id.* at 599.

129. *Id.*

130. *Id.*

131. *Id.* at 598.

132. *Id.* at 597.

133. *Id.* at 588 (majority opinion).

134. See *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531 (D.C. 2011); *Bean v. Cummings*, 939 A.2d 676 (Me. 2008); *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879 (Mass. 2008); *Sisney v. Best Inc.*, 754 N.W.2d 804 (S.D. 2008).

rules.<sup>135</sup> However, the Justice fails to mention that any state that chooses to follow the federal plausibility interpretation of Rule 8 leaves behind decades of judicial history and interpretation. What about the years of federal case law that will now be inapplicable to the Colorado court system? This switch in pleading standard is a stark departure from past federal and state judicial common law.

In addition, proponents of the adoption of plausibility pleading in state court systems cite the same concern over expensive litigation and discovery that the Supreme Court did in the *Twigbal* decisions.<sup>136</sup> Critics question whether this is really the case at the federal system, but even if it is a valid federal concern, state court systems handle significantly different cases than the federal system. Many of the most complicated and expensive litigation is pursued in the federal courts. And even if the state systems do have a discovery problem, the most appropriate way to deal with such a problem is to reconsider the civil rules related to discovery, not pleading. This approach would deal with the problem at hand instead of making an over inclusive change to the pleading standard that would affect all cases.

Procedural uniformity between the federal and state systems has always been a value held by replica jurisdictions, and as such is a primary argument for proponents of plausibility pleading in state courts. However, it is clear that the importance of replica jurisdictions is fading. The nationwide uniformity that the drafters of the FRCP had hoped to achieve never came about. In fact, at its height replica jurisdictions included only 22 states plus the District of Columbia with an additional 7 that were close to replica status.<sup>137</sup> In addition, there have been many actual (not just interpretational) changes to the FRCP over the years that various replica jurisdictions have not adopted. One must question what procedural uniformity it is that these states are hoping to preserve.

### C. *Minnesota Notice Pleading*

There are seven states that have taken up the issue of plausibility pleading and have decided to remain committed to the liberal notice pleading standard.<sup>138</sup> In one such case, *Walsh v U.S. Bank*,<sup>139</sup> the Minnesota Supreme Court unambiguously declared the Court's

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135. *Warne*, 373 P.3d at 593.

136. *Id.* at 594.

137. *See Appendix infra*: Replica Jurisdictions.

138. *See Appendix infra*: Replica Jurisdictions.

139. *Walsh v. U.S. Bank*, 851 N.W.2d 598 (Minn. 2014).

commitment to notice pleading.<sup>140</sup> Justice Lillehaug, writing for the majority, explained that the language of Minnesota Rule of Civil Procedure (MRCP) 8 has been the same since it was adopted in 1951,<sup>141</sup> and that the Court was not bound to follow the changes outlined in *Twigbal*.<sup>142</sup> The Justice pointed out that noticeably absent from Rule 8 or any of the MRCP is the word “plausible.”<sup>143</sup> Minnesota Supreme Court case law did not allow for the addition of words or phrases to unambiguous statutes or rules.<sup>144</sup> And given that MRCP 8 had been successfully interpreted without confusion for nearly 60 years, there was no reason to consider editing its content.<sup>145</sup> *Stare decisis* required the Court to remain committed to former decisions in order to promote the “stability of law and the integrity of the judicial process.”<sup>146</sup>

Justice Lillehaug then explained the history and purpose behind MRCP 8. Minnesota made a conscious decision when developing the MRCP to turn away from code pleading towards notice pleading allowing general statements in a complaint, which may express conclusions.<sup>147</sup> The focus should be on the incident rather than the specific facts of the incident at the pleading stage.<sup>148</sup> Plausibility, on the other hand, headed the opposite direction requiring more facts and specificity which makes it harder for a plaintiff to meet the pleading standard.<sup>149</sup>

Next, Justice Lillehaug considered the context of MRCP 8, which “cuts against the plausibility standard, for five reasons.”<sup>150</sup> First, when the MRCP require more factual specificity, they expressly call for it.<sup>151</sup> For example, MRCP 9, “Pleading Special Matters,” outlines the requirements in order to plead fraud or mistake, which must be stated with particularity.<sup>152</sup> No such language exists in Rule 8, which governs general claims.<sup>153</sup> Second, the MRCP express a preference for short statements that are simple and concise.<sup>154</sup> In order to rise to the level of plausibility

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140. *Id.* at 600.

141. *Id.* at 601.

142. *Id.* at 603.

143. *Id.* at 604.

144. *Cnty. of Dakota v. Cameron*, 839 N.W.2d 700, 709 (Minn. 2013).

145. *Walsh*, 851 N.W.2d at 604.

146. *Id.*

147. *Id.*

148. *Id.* at 605.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

pleading, utilizing the two pronged approach outlined in *Iqbal*, a claim would have to be much longer, complicated, and detailed.

Third, the Justice pointed out that the sample complaints included in the MRCP clearly illustrate that short and plain statements are adequate.<sup>155</sup> Fourth, MRCP 12 provides a way to deal with any lack of precision that results from a liberal, notice pleading standard.<sup>156</sup> A party may move for a more “definite statement” of the pleadings if more detail is necessary to proceed with the case.<sup>157</sup> Lastly, the MRCP already provide multiple case-management tools to help promote an effective and efficient determination of every action when concerns are raised regarding the cost of discovery.<sup>158</sup> In conclusion, the Justice indicated that “based on Rule 8.01’s plain language, purpose and history . . . we decline to adopt the plausibility standard.”<sup>159</sup> There was no dissenting opinion filed in this case.

#### D. *Tennessee Notice Pleading*

Justice Lee and the Supreme Court of Tennessee also chose to remain committed to notice pleading in *Webb v. Nashville Area Habitat for Humanity, Inc.*,<sup>160</sup> and cited several additional reasons why the state would not abandon its liberal pleading standard. As with all replica jurisdictions, the Tennessee court has a “firmly established and longstanding” commitment to notice pleading which existed even before the adoption of the Tennessee Rules of Civil Procedure (TRCP).<sup>161</sup> First of all, Justice Lee pointed out that the federal adoption of plausibility pleading is a sharp departure from the past and has brought “a loss of clarity, stability and predictability in federal pleadings practice.”<sup>162</sup> Indeed the consideration of only two cases drastically changed the federal approach to one of the most fundamental rights we retain as citizens: access to the courts. Justice Lee indicated that this new approach is not only flawed but also has no practical model to demonstrate how to test factual sufficiency in the pleading of one’s case.<sup>163</sup>

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155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 605-06.

159. *Id.* at 606.

160. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422 (Tenn. 2011).

161. *Id.* at 427.

162. *Id.* at 430-31.

163. *Id.* at 431 (citing Kevin M. Clermont & Stephen C. Yeazell, *Inverting Test, Destabilizing Systems*, 95 IOWA L. REV. 821, 832 (2010)).

Secondly, Justice Lee pointed out that plausibility pleading requires the court to make an evaluation about the likelihood of success based on the merits at the earliest stages of the proceedings before adequate facts have been admitted or perhaps even discovered.<sup>164</sup> This new approach not only seems nonsensical, but Justice Lee had concerns about the possibility of state constitutional questions being raised about the right to a jury trial.<sup>165</sup> Next, Justice Lee expressed concern about the potential disproportionate impact of this type of early evaluation of claims in cases that require discovery in order to be proven, like violations of civil rights, employment discrimination, antitrust, and conspiracy.<sup>166</sup> The motivations and intents of the potential defendants in these types of cases can be hard enough to uncover with the aid of the discovery process, let alone without it.

Lastly, the Justice pointed out that neither the defendant nor amici curiae had provided any evidence that the policy concerns that drove the federal courts to make a change in its interpretation of Rule 8 were present in the Tennessee state court system.<sup>167</sup> Justice Gabriel made the same criticism in response to the Colorado Supreme Court's decision to adopt federal plausibility pleading and it is worth repeating.<sup>168</sup> Almost all of the state courts that have adopted plausibility pleading have done so blindly following the federal decision without even the consideration of whether the reasons the Supreme Court outlined in *Twigbal* apply to their respective state courts. This kind of cursory deliberation seems out of step with the significant impact the decision will have on public access to the courts. Justice Lee concludes, "such a broad and sweeping change in the procedural landscape . . . should come by operation of the normal rule-making process" that is much better suited for its consideration.<sup>169</sup>

## VI. THE OHIO RULES OF CIVIL PROCEDURE

### A. *Ohio's Replica Status and Focus on Notice Pleading*

Ohio adopted its own Civil Rules of Procedure (ORCP) in 1970, making it one of the 23 replica jurisdictions.<sup>170</sup> In an effort to maintain uniformity with the federal system and transition away from being a code-

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164. *Id.* at 431-32.

165. *Id.* at 432.

166. *Id.* at 434.

167. *Id.* at 435.

168. *Warne v. Hall*, 373 P.3d 588, 599 (Colo. 2016) (Gabriel, J., dissenting).

169. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 436 (Tenn. 2011).

170. *Jochum*, *supra* note 27, at 503.

pleading jurisdiction, Ohio became a notice-pleading jurisdiction.<sup>171</sup> “Ohio cases embraced the liberal pleading standard embodied by the [FRCP] right from the start.”<sup>172</sup> In 1975, the Supreme Court of Ohio formally adopted *Conley* in *O’Brien v. University Community Tenants Union*.<sup>173</sup> In *O’Brien*, the Ohio Supreme Court explained that although a plaintiff’s claim may be difficult to prove in later stages of the litigation, it should nonetheless survive a motion to dismiss “unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim.”<sup>174</sup>

Even before the *Twigbal* decisions, Ohio had begun to move away from being a replica jurisdiction.<sup>175</sup> Since the adoption of the ORCP, Ohio has moved away from the FRCP at least nine times.<sup>176</sup> Over the years, there are many states that have made similar choices for various reasons.<sup>177</sup> The fact that Ohio was really no longer a replica jurisdiction, even before the changes made by the *Twigbal* decisions, cuts against the argument that Ohio should adopt plausibility pleading in order to maintain a no longer existing uniformity with the FRCP.<sup>178</sup> Not only the text, but also the interpretation of numerous ORCP, would need to change in order to attain this uniformity once again.<sup>179</sup>

More than just adopting a liberal notice pleading standard, the ORCP are written to explicitly state the importance of just results over technical accuracy. This is the first topic addressed in the ORCP, clarifying this emphasis before any of the specific procedural rules. Ohio Civ. R. 1(B): Construction of the Civil Rules-In General states:

**Construction.** These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.<sup>180</sup>

The 1970 staff notes that accompany Civ. R. 1(B) added, “emphasis is placed upon liberal construction rather than upon technical interpretation.”<sup>181</sup> In *Peterson v. Teodosio*, an early decision that is often cited in cases where court rules are being considered, the Ohio Supreme

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171. *Id.*

172. *Id.* at 504.

173. *O’Brien v. Univ. Cmty. Tenants Union, Inc.*, 327 N.E.2d 753 (Ohio 1975).

174. *Id.* at 755 (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

175. Jochum, *supra* note 27, at 522.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. See OHIO CIV. R. 1(B) (emphasis added).

181. OHIO R. CIV. P. 1 staff note (1970).

Court stated, “[t]he spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies. Civ. R. 1(B) requires that the Civil Rules shall be applied ‘to effect just results.’ Pleadings are simply an end to that objective.”<sup>182</sup> In other words, when questions arise given the meaning or intention of the ORCP, the rule in question should always be interpreted to ensure just results. Similarly, in *Cargill, Inc. v. Shiloh Tank and Erection Co.*, the court went so far as to declare that “the ‘cardinal principle’ of Civ. R. 1(B) is to effect ‘just results.’ The general purpose of avoiding delay cannot elevate disagreements between counsel into a denial of justice.”<sup>183</sup>

As already mentioned, this emphasis on just results applies to all the ORCP as reflected in Ohio Civ. R. 8: General Rules for Pleading. Rule 8, which outlines a liberal notice pleading standard, mirrors the FRCP at the time:

**(A) Claims for relief.** A pleading that sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) *a short and plain statement of the claim* showing that the party is entitled to relief

. . . .

**(E) Pleading to be Concise and Direct; Consistency.**

(1) Each averment of a pleading shall be simple, concise, and direct. *No technical forms of pleading or motions are required.*

**(F) Construction of Pleadings.** All pleadings shall be so *construed as to do substantial justice.*<sup>184</sup>

Since the adoption of the ORCP, the Ohio Supreme Court has consistently applied this liberal notice pleading standard as demonstrated in *York v. Ohio State Highway Patrol*. When considering a motion to dismiss, the Court outlined that the Ohio pleading regimen reflected a liberal approach.<sup>185</sup> The Court stated:

[A] plaintiff is not required to prove his or her case at the pleading stage. Very often, the evidence necessary for a plaintiff to prevail is not obtained until the plaintiff is able to discover materials in the defendant’s possession. If the plaintiff were required to prove his or her

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182. Peterson v. Teodosio, 297 N.E.2d 113, 122 (Ohio 1973).

183. Cargill, Inc. v. Shiloh Tank and Erection Company, Case No. 7816, 1982 WL 3837, at \*2 (Ohio Dist. Ct. App. 2 Oct. 27, 1982).

184. See OHIO CIV. R. 8 (emphasis added).

185. York v. Ohio State Highway Patrol, 573 N.E.2d 1063, 1065 (Ohio 1991).



case in the complaint, many valid claims would be dismissed because of the plaintiff's lack of access to relevant evidence.<sup>186</sup>

Similarly, in *Cincinnati v. Beretta U.S.A.*, once again considering a motion to dismiss, the Court stated that, "as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss."<sup>187</sup> This language is very similar to the language of *Conley v. Gibson*,<sup>188</sup> which outlined the liberal notice pleading standard for the federal courts.

### B. Ways to Amend ORCP

Each state has a specific process for amending court rules. In some states, it is a legislative process. In others, changes are made through the development of the common law via court decisions. In Ohio, the rulemaking and amending process is outlined in the state constitution.<sup>189</sup> In 1968, the citizens of Ohio approved the Modern Courts Amendment to the Ohio Constitution granting the Ohio Supreme Court rule-making authority.<sup>190</sup> The process outlined for amending the ORCP is deliberate, comprehensive, and multi-layered demonstrating the serious consideration required before changing the Rules. Pursuant to this responsibility, the Ohio Supreme Court created the Commission on the Rules of Practice and Procedure (Commission) to facilitate the process.<sup>191</sup> The Commission includes 19 members including judges and practicing attorneys.<sup>192</sup>

The Commission considers any proposed amendments to the ORCP and submits them to the Ohio Supreme Court.<sup>193</sup> The Court then authorizes the proposed amendments for public comment without any endorsement or revisions.<sup>194</sup> This period allows the legal community and the public at large to provide meaningful feedback about the proposed

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186. *Id.*

187. *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, at ¶ 5 (Ohio 2002) (quoting *York v. Ohio State Highway Patrol*, 573 N.E.2d 1063, 1065 (Ohio 1991)).

188. *Conley v. Gibson*, 355 U.S. 41 (1957).

189. OHIO CONST. art. IV, § 5(B).

190. Process on Amending the Rules of Practice and Procedure in Ohio Courts, THE SUPREME COURT OF OHIO AND THE OHIO JUDICIAL SYSTEM, <http://www.supremecourtsofohio.gov/ruleamendments/documents/P%20%20P%20Final%20Rules%20June%2030%202016.pdf> [https://perma.cc/549C-2PF5] (last visited May, 15, 2018).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

changes and the potential impact on the judicial process.<sup>195</sup> After the closing of this period, the Commission considers the feedback gathered, makes appropriate revisions, and submits the updated proposed amendments to the Court.<sup>196</sup> The Court then files the proposed amendments with the General Assembly and begins a second round of public comments.<sup>197</sup> The Commission again considers the public feedback and makes final revisions before submitting to the Court.<sup>198</sup> The Court may then accept any or all of the proposed amendments and files those with the General Assembly.<sup>199</sup> If the General Assembly does not enact legislation disapproving the amendments, they become effective.<sup>200</sup>

The multi-step process provides deliberate and intentional feedback. Absent a meaningful reason to circumvent this process, any changes or amendments to the ORCP should follow these procedures to ensure that changes are made in light of Ohio's historical commitment to just results above all else.

### C. *Ohio Appellate Court Split Since Twiqbal*

#### 1. Ohio State Court System

The Supreme Court of Ohio is the court of last resort for the state.<sup>201</sup> Most of its cases are appealed from the 12 district courts of appeals.<sup>202</sup> The Court must also hear cases in which there have been conflicting opinions from two or more of these district courts. Similarly, the district courts of appeals hear cases that have been appealed from the courts of common pleas, municipal, and county courts in their respective districts. At this time, the topic of pleading standards has not been addressed by the Supreme Court of Ohio even though there have been cases from the courts of appeals that have presented this issue.<sup>203</sup> By default, Ohio remains a notice pleading state.

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195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. Judicial System Structure, THE SUPREME COURT OF OHIO AND THE OHIO JUDICIAL SYSTEM, <http://www.supremecourt.ohio.gov/JudSystem/default.asp> [<https://perma.cc/MKJ5-MNHJ>] (last visited Mar. 26, 2018).

202. *Id.*

203. Brief for Appellant, Francisco et al., v. Oberlin City School District Board of Education, No. 10-0873, 2010 WL 2097542 (Ohio Sup. Ct. May 14, 2010).

## 2. Ohio State Court Case Study: District Court Split

The situation in the Ohio court system is reflective of the confusion the *Twigbal* decisions created for the federal court system. On the one hand, Ohio is officially a notice pleading state because the ORCP have not been amended and the Ohio Supreme Court has not changed the interpretation of the Rules through common law. On the other hand, pleading standards do not appear to be consistent across the state. In fact, a continuum of interpretation is developing given the lack of clarity regarding the impact of plausibility pleading in Ohio. At first glance it appears as though notice pleading is safe and sound in Ohio, however, if you look closely at the progression of cases in the different district courts the picture becomes less clear.

Only 2 of Ohio's 12 district courts (Second<sup>204</sup> and Seventh<sup>205</sup>) have addressed the issue directly and confirmed notice pleading. Six of the districts (First,<sup>206</sup> Third,<sup>207</sup> Fifth,<sup>208</sup> Sixth,<sup>209</sup> and Twelfth<sup>210</sup>) have not directly addressed plausibility pleading but have indirectly cited their commitment to notice pleading. The Fourth District has not addressed the issue at all, so it remains a notice pleading jurisdiction by default. It remains unclear what direction the Tenth<sup>211</sup> and Eleventh<sup>212</sup> Districts intend to head, so it may or may not be safe to assume notice pleading remains. The Ninth District, which has been repeatedly cited for making the move to plausibility pleading, seems to have expressly adopted this change by its continued reliance on the *Twigbal* decisions.<sup>213</sup> And lastly the Eighth District, which has by far heard the most cases on the issue, has

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204. See *Sacksteder v. Senney*, 2012-Ohio-4452, No. 24993, 2012 WL 4480695 (Ohio Ct. App. 2d Dist. Sept. 28, 2012).

205. See *Bahen v. Diocese of Steubenville*, 2012-Ohio-4452, No. 11 JE 34, 2013 WL 2316640 (Ohio Ct. App. 7th Dist. May 24, 2013).

206. See *Poole v. Lenzly*, 2013-Ohio-4148, No. C-130141, 2013 WL 5432132 (Ohio Ct. App. 1st Dist. Sept. 25, 2013).

207. See *Baker v. Mosler*, 2013-Ohio-4976, No. 1-13-05, 2013 WL 6035327 (Ohio Ct. App. 3d Dist. Nov. 12, 2013).

208. See *New Lexington City Sch. Dist. Bd. of Educ. v. Muzo Inv. Group*, 2016-Ohio-1138, No. 15-CA-00012, 2016 WL 1243203 (Ohio Ct. App. 5th Dist. Mar. 29, 2016).

209. See *US Bank v. Coffey*, 2012-Ohio-721, No. E-11-026, 2012 WL 601472 (Ohio Ct. App. 6th Dist. Feb. 24, 2012).

210. See *Klan v. Medical Radiologists*, 2014-Ohio-2344, No. CA2014-01-007, 2014 WL 2526116 (Ohio Ct. App. 12th Dist. June 2, 2014).

211. See *Carasalina, LLC v. Smith Phillips & Assocs.*, 2014-Ohio-2423, No. 13AP-1027, 2014 WL 2573466 (Ohio Ct. App. 10th Dist. June 5, 2014).

212. See *Ragazzo v. City of Willowick*, 2017-Ohio-9337, No. 2017-L-061, 2017 WL 6729203 (Ohio Ct. App. 11th Dist. Dec. 29, 2017).

213. See *Vagas v. City of Hudson*, 2009-Ohio-6794, No. 24713, 2009 WL 4981219 (Ohio Ct. App. 9th Dist. Dec. 23, 2009).

flip-flopped back and forth between accepting and rejecting plausibility pleading.<sup>214</sup>

**Chart I: Ohio Courts of Appeals<sup>215</sup>**

<b>District</b>	<b>Pleading Standard</b>	<b>Most Recent Case Name</b>	<b>Directly Address?</b>
1st	Notice	<i>Poole v. Lenzly</i> <sup>216</sup>	Indirectly
2nd	Notice	<i>Sacksteder v. Senney</i> <sup>217</sup>	Yes
3rd	Notice	<i>Baker v. Mosler</i> <sup>218</sup>	Indirectly
4th	Notice	n/a	No
5th	Notice	<i>Citibank, NA v. Abrahamson</i> <sup>219</sup>	Indirectly
6th	Notice	<i>US Bank v. Coffey</i> <sup>220</sup>	Indirectly
7th	Notice	<i>Fed. Nat'l Mortg. Ass'n v. Brown</i> <sup>221</sup>	Yes
8th	Both	<i>Smiley v. Cleveland</i> <sup>222</sup>	Yes
9th	Plausibility	<i>Vagas v. City of Hudson</i> <sup>223</sup>	Yes
10th	Not Clear	<i>Carasalina v. Smith Phillips and Assoc.</i> <sup>224</sup>	Unknown
11th	Not Clear	<i>Ragazzo v. City of Willowick</i> <sup>225</sup>	Indirectly

214. See *infra* Chart II.

215. This chart lists the Ohio Courts of Appeals and the most recent case in each district that addresses (or not) plausibility pleading.

216. *Poole v. Lenzly*, 2013-Ohio-4148, No. C-130141, 2013 WL 5432132 (Ohio Ct. App. 1st Dist. Sept. 25, 2013).

217. *Sacksteder v. Senney*, 2012-Ohio-4452, No. 24993, 2012 WL 4480695 (Ohio Ct. App. 2d Dist. Sept. 28, 2012).

218. *Baker v. Mosler*, 2013-Ohio-4976, No. 1-13-05, 2013 WL 6035327 (Ohio Ct. App. 3d Dist. Nov. 12, 2013).

219. *Citibank, NA v. Abrahamson*, 2017-Ohio-5566, No. AP-11-0055, 2017 WL 2817571 (Ohio Ct. App. 5th Dist. June 28, 2017).

220. *US Bank v. Coffey*, 2012-Ohio-721, No. E-11-026, 2012 WL 601472 (Ohio Ct. App. 6th Dist. Feb. 24, 2012).

221. *Fed. Nat'l Mortg. Ass'n v. Brown*, 2017-Ohio-9237, No. 16-CO-0008, 2017 WL 6550544 (Ohio Ct. App. 7th Dist. Dec. 22, 2017).

222. *Smiley v. Cleveland*, 2016-Ohio-7711, No. 103987, 2016 WL 6673178 (Ohio Ct. App. Dist. 8th Nov. 10, 2016).

223. *Vagas v. City of Hudson*, 2009-Ohio-6794, No. 24713, 2009 WL 4981219 (Ohio Ct. App. 9th Dist. Dec. 23, 2009).

224. *Carasalina, LLC v. Smith Phillips & Assocs.*, 2014-Ohio-2423, No. 13AP-1027, 2014 WL 2573466 (Ohio Ct. App. 10th Dist. June 5, 2014).

225. *Ragazzo v. City of Willowick*, 2017-Ohio-9337, No. 2017-L-061, 2017 WL 6729203

12th	Notice	<i>Klan v. Medical Radiologists</i> <sup>226</sup>	Indirectly
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To demonstrate the confusion that the federal move to plausibility pleading has caused in Ohio, consider in more detail the Eighth District's cases on the matter. As of 2017, there have been over 40 published decisions in Ohio that have considered plausibility pleading and half of those have been in the Eighth District Court of Appeals, and the holdings in those cases have been "inopportunately inconsistent."<sup>227</sup>

*Gallo v. Westfield National Insurance Co.*<sup>228</sup> made the first reference to *Twombly* in the Eighth District and was continually cited as establishing the move towards plausibility pleading.<sup>229</sup> Without directly addressing the issue or providing reasons for this change, the court applied the plausibility standard when considering the facts of the case and determined that the "complaint must be plausible, rather than conceivable."<sup>230</sup>

Four years later, the Eighth District returned to citing the liberal pleading standard of Rule 8 in *State ex rel. Yeaples v. Gall*<sup>231</sup> and *Bush v. Cleveland Municipal School District*.<sup>232</sup> Once again, the Court did not directly address plausibility pleading, but simply returned to citing the traditional Rule 8 liberal notice pleading standard and applied it to the facts of the cases. Then in *Dottore v. Vorys, Sater, Seymour & Pease, L.L.P.* the court recognized the fact that both the plausibility and traditional notice standards had been recently utilized in Ohio but

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(Ohio Ct. App. 11th Dist. Dec. 29, 2017).

226. *Klan v. Medical Radiologists*, 2014-Ohio-2344, No. CA2014-01-007, 2014 WL 2526116 (Ohio Ct. App. 12th Dist. June 2, 2014).

227. Jalandoni & Shouvlín, *supra* note 107.

228. *Gallo v. Westfield Nat'l Ins. Co.*, 2009-Ohio-1094, No. 91813, 2009 WL 625522 (Ohio Ct. App. 8th Dist. Mar. 12, 2009).

229. See *Williams v. Ohio Edison*, 2009-Ohio-5702, No. 92840, 2009 WL 3490945, at ¶ 15 (Ohio Ct. App. 8th Dist. Oct. 29, 2009); *Parsons v. Greater Cleveland Regional Transit Auth.*, 2010-Ohio-266, No. 93523, 2010 WL 323420, at ¶ 11 (Ohio Ct. App. 8th Dist. Jan. 28, 2010); *Fink v. Twentieth Cent. Homes, Inc.*, 2010-Ohio-5486, No. 94519, 2010 WL 4520482, at ¶ 24 (Ohio Ct. App. 8th Dist. Nov. 10, 2010); *DiGiorgio v. Cleveland*, 196 Ohio. App. 3d 575, 579 (Ohio Ct. App. 8th Dist. 2011); *Snowville Subdivision Joint Venture Phase I v. Home S. & L. of Youngstown, Ohio*, 2012-Ohio-1342, No. 96675, 2012 WL 1067748, at ¶¶ 9, 10 (Ohio Ct. App. 8th Dist. Mar. 29, 2012); *Cleveland v. JP Morgan Chase Bank N.A.*, 2013-Ohio-1035, No. 98656, 2013 WL 1183332, at ¶ 11 (Ohio Ct. App. 8th Dist. Mar. 21, 2013).

230. See *Gallo*, 2009 WL 625522, at ¶ 9 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

231. *State ex rel. Yeaples v. Gall*, No. 99454, 2013 WL 2382824 at ¶¶ 10, 12 (Ohio Ct. App. 8th Dist. May 24, 2013).

232. *Bush v. Cleveland Mun. School Dist.*, 2013-Ohio-5420, No. 99612, 2013 WL 6571821, at ¶¶ 5, 12 (Ohio Ct. App. 8th Dist. Dec. 12, 2013).

“decline[ed] to address the . . . stricter ‘plausibility standard’ set forth in *Twombly* and its progeny.”<sup>233</sup>

The court finally seemed to come to the conclusion that Ohio was indeed a notice pleading jurisdiction in *Tuleta v. Medical Mutual of Ohio*.<sup>234</sup> In that case, Judge Boyle thoroughly recited the history of Ohio’s pleading standard and the federal move to plausibility pleading.<sup>235</sup> In light of that history, the federal decisions in *Twombly* and *Iqbal*, and the related Ohio appellate decisions, the court rejected the assertion that it had adopted plausibility pleading simply because it had cited to it, and further rejected the “contention that we should apply the heightened federal pleading standard.”<sup>236</sup> Given the thorough nature of the discussion, *Tuleta*<sup>237</sup> became the standing authority on the issue.<sup>238</sup>

Most recently, though, another set of cases bounced back and forth citing both pleading standards. The court in *Sultaana v. Horseshoe Casino* returned to the habit of applying *Twombly* via reference to *DiGiorno v. Cleveland*<sup>239</sup> and called for “further factual enhancement.”<sup>240</sup> A year later, *Smiley v. Cleveland* expressly rejected *Twombly* via *Tuleta* as if it were a foregone conclusion.<sup>241</sup> This tedious recitation of this case history is not meant to nitpick the court, but to illustrate the inconsistent positions that have developed throughout the state. This is what can happen when the courts rely on holdings in individual cases rather than the established rule-making process to clarify or amend civil rules. Singular issues and perspectives may be addressed through case law, but comprehensive consideration of the important topic is lost. Given the focus of the ORCP on just results, the pleading standard in Ohio should not be changed unless given due consideration. However, this topic has not made it to the Commission.

233. *Dottore v. Vorys, Sater, Seymour & Pease, L.L.P.*, 2014-Ohio-25, No. 98861, 2014 WL 72538, at ¶ 122 (Ohio Ct. App. 8th Dist. Jan. 9, 2014).

234. *Tuleta v. Med. Mut. of Ohio*, 2014-Ohio-396, 6 N.E.3d 106 (Ohio Ct. App. 8th Dist. Feb. 6, 2014).

235. *Id.* at 113-14.

236. *Id.* at 115.

237. *Id.*

238. See *Hendrickson v. Haven Place, Inc.*, 2014-Ohio-3726, No. 100816, 2014 WL 4261947, at ¶¶ 8, 9 (Ohio Ct. App. 8th Dist. Aug. 28, 2014); *Henderson v. State*, 2015-Ohio-1742, No. 101862, 2015 WL 2168359, at ¶ 9 (Ohio Ct. App. 8th Dist. May 7, 2015); *Mangelluzzi v. Morley*, 2015-Ohio-3143, 40 N.E.3d 588 (Ohio Ct. App. 8th Dist. Aug. 6, 2015).

239. *DiGorgio v. Cleveland*, 2011-Ohio-5878, No. 95945, 2011 WL 5517366 (Ohio Ct. App. 8th Dist. Nov. 10, 2011).

240. *Sultaana v. Horseshoe Casino*, 2015-Ohio-4083, No. 102501, 2015 WL 5781097, at ¶ 12 (Ohio Ct. App. 8th Dist. 8th Oct. 1, 2015).

241. *Smiley v. Cleveland*, 2016-Ohio-7711, No. 103987, 2016 WL 6673178, at ¶ 5 (Ohio Ct. App. Dist. 8th Nov. 10, 2016).

**Chart II: Ohio Court of Appeals, Eighth District<sup>242</sup>**

<b>Date</b>	<b>Case Name</b>	<b>Holding</b>
Mar. 12, 2009	<i>Gallo v. Westfield Nat'l Ins. Co.</i> <sup>243</sup>	Cited <i>Twombly</i>
Oct. 29, 2009	<i>Williams v. Ohio Edison</i> <sup>244</sup>	Cited <i>Twombly</i>
Jan. 28, 2010	<i>Parsons v. Greater Cleveland Regional Transit Auth.</i> <sup>245</sup>	Cited <i>Twombly</i>
Nov. 10, 2010	<i>Fink v. Twentieth Century Homes, Inc.</i> <sup>246</sup>	Cited <i>Twombly</i>
Nov. 10, 2011	<i>DiGorgio v. Cleveland</i> <sup>247</sup>	Cited <i>Twombly</i> via <i>Parsons</i>
Mar. 29, 2012	<i>Snowville Subdivision Joint Venture Phase I v. Home S. &amp; L. of Youngstown</i> <sup>248</sup>	Cited <i>Twombly</i>
Mar. 21, 2013	<i>Cleveland v. JP Morgan Chase Bank</i> <sup>249</sup>	Cited <i>Twombly</i> via <i>Gallo</i>
May 24, 2013	<i>State ex rel. Yeaples v. Gall</i> <sup>250</sup>	Notice pleading
Dec. 12, 2013	<i>Bush v. Cleveland Muni. Sch. Dist.</i> <sup>251</sup>	Notice pleading

242. This chart lists the cases from the Ohio Eighth District Court of Appeals that have addressed notice and plausibility pleading.

243. *Gallo v. Westfield Nat'l Ins. Co.*, 2009-Ohio-1094, No. 91813, 2009 WL 625522 (Ohio Ct. App. 8th Dist. Mar. 12, 2009).

244. *Williams v. Ohio Edison*, 2009-Ohio-5702, No. 92840, 2009 WL 3490945 (Ohio Ct. App. 8th Dist. Oct. 29, 2009).

245. *Parsons v. Greater Cleveland Regional Transit Auth.*, 2010-Ohio-266, No. 93523, 2010 WL 323420 (Ohio Ct. App. 8th Dist. Jan. 28, 2010).

246. *Fink v. Twentieth Cent. Homes, Inc.*, 2010-Ohio-5486, No. 94519, 2010 WL 4520482 (Ohio Ct. App. 8th Dist. Nov. 10, 2010).

247. *DiGorgio v. Cleveland*, 2011-Ohio-5878, No. 95945, 2011 WL 5517366 (Ohio Ct. App. 8th Dist. Nov. 10, 2011).

248. *Snowville Subdivision Joint Venture Phase I v. Home S. & L. of Youngstown*, Ohio, 2012-Ohio-1342, No. 96675, 2012 WL 1067748 (Ohio Ct. App. 8th Dist. Mar. 29, 2012).

249. *Cleveland v. JP Morgan Chase Bank N.A.*, 2013-Ohio-1035, No. 98656, 2013 WL 1183332 (Ohio Ct. App. 8th Dist. Mar. 21, 2013).

250. *State ex rel. Yeaples v. Gall*, No. 99454, 2013 WL 2382824 (Ohio Ct. App. 8th Dist. May 24, 2013).

251. *Bush v. Cleveland Mun. School Dist.*, 2013-Ohio-5420, No. 99612, 2013 WL 6571821 (Ohio Ct. App. 8th Dist. Dec. 12, 2013).

Jan. 9, 2014	<i>Dottore v. Vorys, Sater, Seymour &amp; Pease</i> <sup>252</sup>	Acknowledges divide, but does not address
Mar. 13, 2014	<i>Tuleta v. Med. Mut. of Ohio</i> <sup>253</sup>	Notice pleading
June 2, 2014	<i>Klan v. Medical Radiologists</i> <sup>254</sup>	Cited <i>Tuleta</i> , notice pleading
Aug. 28, 2014	<i>Hendrickson v. Haven Place, Inc.</i> <sup>255</sup>	Cited <i>Tuleta</i> , notice pleading
May 7, 2015	<i>Henderson v. State</i> <sup>256</sup>	Cited <i>Tuleta</i> , notice pleading
Aug. 6, 2015	<i>Mangelluzzi v. Morley</i> <sup>257</sup>	Cited <i>Tuleta</i> , notice pleading
Oct. 1, 2015	<i>Sultaana v. Horseshoe Casino</i> <sup>258</sup>	Cited <i>Twombly</i> via <i>DiGiorno</i>
Nov. 10, 2016	<i>Smiley v. Cleveland</i> <sup>259</sup>	Expressly rejects <i>Twombly</i>

### 3. What has the Ohio Supreme Court Said (if anything)?

Ohio became a notice pleading state in 1970 with the adoption of the ORCP.<sup>260</sup> As outlined in *Iacono v. Anderson Concrete Corp.*:

All pleadings shall be construed as to do substantial justice . . . reject[ing] the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the

252. *Dottore v. Vorys, Sater, Seymour & Pease, L.L.P.*, 2014-Ohio-25, No. 98861, 2014 WL 72538 (Ohio Ct. App. 8th Dist. Jan. 9, 2014).

253. *Tuleta v. Med. Mut. of Ohio*, 2014-Ohio-396, 6 N.E.3d 106 (Ohio Ct. App. 8th Dist. Feb. 6, 2014).

254. *Klan v. Medical Radiologists*, 2014-Ohio-2344, No. CA2014-01-007, 2014 WL 2526116 (Ohio Ct. App. 12th Dist. June 2, 2014).

255. *Hendrickson v. Haven Place, Inc.*, 2014-Ohio-3726, No. 100816, 2014 WL 4261947 (Ohio Ct. App. 8th Dist. Aug. 28, 2014).

256. *Henderson v. State*, 2015-Ohio-1742, No. 101862, 2015 WL 2168359 (Ohio Ct. App. 8th Dist. May 7, 2015).

257. *Mangelluzzi v. Morley*, 2015-Ohio-3143, 40 N.E.3d 588 (Ohio Ct. App. 8th Dist. Aug. 6, 2015).

258. *Sultaana v. Horseshoe Casino*, 2015-Ohio-4083, No. 102501, 2015 WL 5781097 (Ohio Ct. App. 8th Dist. 8th Oct. 1, 2015).

259. *Smiley v. Cleveland*, 2016-Ohio-7711, No. 103987, 2016 WL 6673178 (Ohio Ct. App. Dist. 8th Nov. 10, 2016).

260. *Jochum*, *supra* note 27, at 503.



principle that the purpose of pleading is to facilitate a proper decision on the merits.<sup>261</sup>

More recently, in *York v. Ohio State Highway Patrol*, the Ohio Supreme Court confirmed that a plaintiff is not required to prove his or her case at the pleading stage.<sup>262</sup> “If the plaintiff were required to prove his or her case in the complaint, many valid claims would be dismissed because of the plaintiff’s lack of access to relevant evidence.”<sup>263</sup> These are just two of the many times the Ohio Supreme Court outlined its commitment to notice pleading.

As illustrated by the Colorado, Minnesota, and Tennessee state supreme courts, states are being forced to reconsider their pleading standard in the wake of the *Twigbal* decisions. The Ohio Supreme Court has yet to address this specific issue even though it is required to review conflicting opinions among two or more of the courts of appeals.<sup>264</sup> However, there have been cases where a dissenting Justice has felt it necessary to remind the court that Ohio is a notice-pleading jurisdiction. For example, in *Kincaid v. Erie Insurance*, Justice Brown wrote for the dissent and reminded the majority that Ohio is a notice pleading state and “[t]he goal of a notice-pleading standard is to avoid dismissal of claims because of hypertechnical legal requirements. Notice pleading is just that—a pleading that gives notice of the claims asserted.”<sup>265</sup>

And again in *State ex rel. Yeaples v. Gall*, Justice O’Neill wrote in his dissent that he is troubled by the degree of specificity the majority looked for in determining if the complaint sufficiently met the notice pleading standard.<sup>266</sup> The complaint clearly identified the defendant and stated the basis for the claim.<sup>267</sup> “In Ohio, that is all that is required.”<sup>268</sup> Until such time that the ORCP are amended or the Ohio Supreme Court addresses the issue of plausibility pleading, Ohio will officially remain a notice pleading state, but there is plenty of evidence that not all of the district judges share this opinion.

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261. *Iacono v. Anderson Concrete Corp.*, 42 Ohio St. 2d 88, 92 (1975) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

262. *York v. Ohio State Highway Patrol*, 60 Ohio St. 3d 143 (1991).

263. *Id.* at 145.

264. See Judicial System Structure, *supra* note 201.

265. *Kincaid v. Erie Ins. Co.*, 128 Ohio St. 3d 322, 327 (2010) (Brown, J., dissenting).

266. *State ex rel. Yeaples v. Gall*, 141 Ohio St. 3d 234, 242-43 (2014) (O’Neill, J., dissenting).

267. *Id.*

268. *Id.*

## VII. OHIO SHOULD REMAIN COMMITTED TO NOTICE PLEADING

Regardless of replica status, Ohio should remain committed to notice pleading. Many of the reasons for this recommendation were outlined by the Supreme Court of Minnesota in *Walsh v. U.S. Bank, N.A.*,<sup>269</sup> and the Supreme Court of Tennessee in *Webb v. Nashville Area Habitat for Humanity, Inc.*,<sup>270</sup> as well as in the *Warne v. Hall*<sup>271</sup> dissent of the Colorado Supreme Court. These reasons include:

- Plausibility pleading represents a drastic departure from the decades long successful application of the liberal notice pleading standard. Stare decisis requires the Court to remain true to prior court decisions.<sup>272</sup>
- The plausibility standard is unclear and practically hard to apply.<sup>273</sup>
- There are other civil rules that more directly address issues related to discovery and the litigation process.<sup>274</sup>
- Constitutional concerns regarding the right to a jury trial are raised when judges prematurely rule on the merits of a claim before sufficient discovery has been allowed.<sup>275</sup> As already outlined, Ohio's long-established preference for just results is outlined in Ohio Civ. Rule 1(B).

Given this predisposition, notice pleading is the only alternative for the state. The nature of plausibility pleading is such that some meritorious cases will be inappropriately dismissed simply because the plaintiff cannot provide enough facts to meet the heightened standard. This approach would favor efficiency over just results and be in direct conflict with the foundational purposes of the ORCP.

In light of Ohio's focus on just results, plausibility pleading is inappropriate because it is harder for a judge to fairly apply this standard. Plausibility pleading requires a litigant to plead their case with sufficient facts so that the judge can use their common sense and experience to evaluate whether the claim moves beyond possible to probable without the benefit of any discovery devices.<sup>276</sup> This standard "gives judges too

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269. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598 (Minn. 2014).

270. *Webb v. Nashville Area Habitat for Humanity Inc.*, 346 S.W.3d 422 (Tenn. 2011).

271. *Warne v. Hall*, 373 P.3d 588 (Colo. 2016).

272. *Id.* at 601.

273. *Webb*, 346 S.W.3d at 431.

274. *Warne*, 373 P.3d at 601 (Gabriel, J., dissenting).

275. *Webb*, 346 S.W.3d at 432.

276. Michael Sheran, *Diverging Paths: The Minnesota Supreme Court's Decision to Reject the "Plausibility" Pleading Standard in Walsh v. U.S. Bank*, 41 WILLIAM MITCHELL L. REV. SUA SPONTE 1654, 1682 (2015).

much discretion in controlling a claim's fate."<sup>277</sup> Whereas in a notice pleading jurisdiction the judge only has to make sure that the defendant has been notified of the claims being made, which requires a much less subjective evaluation. The more liberal notice pleading approach insures that every person will have their day in court if they meet the minimum requirements of the Rules.

Concerns over information asymmetry and accessibility of the trial process are especially relevant for pro se clients. The judicial system is intimidating and confusing enough for citizens who pursue cases with the help of an attorney, let alone for those who choose or are forced to represent themselves. Plausibility pleading's heightened standard and confusing requirements creates yet another hurdle for these parties. Those who stand to benefit from this kind of system are corporate or governmental defendants who wish to avoid civil litigation.<sup>278</sup> "In this regard, plausibility pleading seems to be part of a broader agenda to limit citizen access to the courts. . . ."<sup>279</sup> Such an attempt is certainly not in line with the intentions of the ORCP and does not benefit Ohio citizens.

Perhaps the most important consideration for jurisdictions to make is whether the change in pleading standard would disproportionately affect certain kinds of cases. The plausibility pleading standard is especially difficult for a plaintiff to satisfy when the essential information needed to support the complaint is in the hands of the defendant. This is the case with civil rights and employment discrimination cases, among others.<sup>280</sup> In these cases, the plaintiffs need the help of the discovery process to secure the evidence needed to prove their case, "since the defendant has been able to conceal this evidence so effectively."<sup>281</sup> This problem is amplified by the fact that a plaintiff in this situation is often a lone individual taking on a large organization in an attempt to secure their rights. Should a concern about potentially expensive discovery bar plaintiffs from being able to challenge the violation of these most basic rights?

In the past, this information asymmetry was addressed through basic pleading requirements and liberal discovery process.<sup>282</sup> Plausibility pleading removes the ability of some litigants to pursue cases because the

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277. *Id.*

278. Funk et al., *supra* note 41, at 12-13.

279. *Id.* at 15.

280. Michalski, *supra* note 3, at 120.

281. Funk et al., *supra* note 41, at 10.

282. *Id.*

amount of evidence they will need to present just to proceed to trial is too onerous and inaccessible.

### VIII. CONCLUSION

The *Twigbal* decisions set the federal court system on a new course, changing the pleading requirements for federal litigants. Given the changing nature of the FRCP and the decreased importance of replica jurisdiction status, state court systems should take a hard look at the implications of changing the pleading standard before following the federal trend. As one of these replica jurisdictions, Ohio is presented with this issue. Due to the inconsistent application of plausibility pleading that has occurred in the Ohio Courts of Appeals, the issue needs to be proactively addressed. Ideally, no change will be made, and the Ohio Supreme Court will take advantage of this opportunity to recommit the state to notice pleading. But if there is a need to examine the Ohio pleading standard, or more appropriately the ORCP related to discovery, the normal rule-amending process should be followed to ensure the rights of all Ohio citizens to access the courts.

This country has a long-held belief that access to justice via the court system is a fundamental right guaranteed to all people. This includes those litigants that, due to the nature of their claim or available resources, may not have access to all of the evidence related to their suit before trial commences. If Ohio's pleading standard is heightened these litigants would essentially be cut off from the court system and their fundamental rights. The process to make changes to both the FRCP and state rules are thorough and deliberate to ensure that a change like this could not happen. Efficient use of court resources is important but certainly no more important than every person's right to have their day in court.

APPENDIX: REPLICA JURISDICTIONS<sup>283</sup>

Replica States	Status as of 2017	Directly Addressed	Case Name
Alabama	Notice	No	n/a
Alaska	Notice	No	n/a
Arizona	Notice	Yes	<i>Cullen v. Auto-Owners Ins. Co.</i> <sup>284</sup>
Colorado	Plausibility	Yes	<i>Warne v. Hall</i> <sup>285</sup>
District of Columbia	Plausibility	Yes	<i>Potomac Dev. Corp. v. District of Columbia</i> <sup>286</sup>
Hawaii	Notice	No	n/a
Indiana	Notice	No	n/a
Kentucky	Notice	No	n/a
Maine	Plausibility	Yes	<i>Bean v. Cummings</i> <sup>287</sup>
Massachusetts	Plausibility	Yes	<i>Iannacchino v. Ford Motor Co.</i> <sup>288</sup>
Minnesota	Notice	Yes	<i>Walsh v. U.S. Bank</i> <sup>289</sup>
Montana	Notice	Yes	<i>Brilz v. Metropolitan General Ins. Co.</i> <sup>290</sup>
New Mexico	Notice	No	<i>Zamora v. St. Vincent Hosp.</i> <sup>291</sup>
North Dakota	Notice	No	n/a
Ohio	Notice	No	n/a
Rhode Island	Notice	No	<i>DiLibero v. Mortgage Elec. Registration Sys., Inc.</i> <sup>292</sup>
South Dakota	Plausibility	Yes	<i>Sisney v. Best Inc.</i> <sup>293</sup>
Tennessee	Notice	Yes	<i>Webb v. Nashville Area Habitat for Humanity, Inc.</i> <sup>294</sup>

283. This chart lists each of the “replica” jurisdictions and the status of the pleading standard in their respective state as of publication of this Article. It also lists whether or not the state supreme court has directly addressed the issue. If so, the case citation is included.

284. See *Cullen v. Auto-Owners Ins. Co.*, 198 P.3d 344 (Ariz. 2008).

285. See *Warne v. Hall*, 373 P.3d 588 (Colo. 2016).

286. See *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531 (D.C. 2011).

287. See *Bean v. Cummings*, 939 A.2d 676 (Me. 2008).

288. See *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879 (Mass. 2008).

289. See *Walsh v. U.S. Bank*, NA, 851 N.W.2d 598 (Minn. 2014).

290. See *Brilz v. Metro. Gen. Ins. Co.*, 285 P.3d 494 (Mont. 2012).

291. See *Zamora v. Saint Vincent Hosp.*, 335 P.3d 1243 (N.M. 2014).

292. See *DiLibero v. Mortgage Elec. Registration Sys., Inc.*, 108 A.3d 1013 (R.I. 2015).

293. See *Sisney v. Best Inc.*, 754 N.W.2d 804 (S.D. 2008).

294. See *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422 (Tenn. 2011).

	Utah	Notice	No	<i>America West Bank Members, L.C. v. State</i> <sup>295</sup>
	Vermont	Notice	No	n/a
	Washington	Notice	Yes	<i>McCurry v. Chevy Chase Bank, FSB</i> <sup>296</sup>
	West Virginia	Notice	No	n/a
	Wyoming	Notice	No	n/a
<b>Statutory States</b>				
	Georgia	Notice	No	n/a
	Kansas	Notice	No	n/a
	North Carolina	Notice	No	n/a
	Oklahoma	Notice	No	n/a
<b>Affinity States</b>				
	Idaho	Notice	No	n/a
	Mississippi	Notice	No	n/a
	Nevada	Notice	Yes	<i>Garcia v. Prudential Ins. Co. of Am.</i> <sup>297</sup>

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295. See *Am. W. Bank Members, L.C. v. State*, 342 P.3d 224 (Utah 2014).

296. See *McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861 (Wash. 2010).

297. See *Garcia v. Prudential Ins. Co. of Am.*, 293 P.3d 869 (Nev. 2013).